SO ORDERED.

SIGNED this 14 day of October, 2004.

JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:	)	
JAMES LEROY WOODLING,	)	**Case No. 03-40183**
	)	
Debtor.	)	
	)	
	)	
CENTEX HOME EQUITY COMPANY, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Adversary No. 03-7102**
	)	
JAMES LEROY WOODLING,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

This matter is before the Court on Centex's Motion to Vacate Confirmation of Plan and Objection to Debtor's Plan[1] and Centex's Adversary Complaint for Declaratory Judgment to Determine Improper Stripping of Lien and Motion to Vacate Confirmation of Plan and Objection to Debtor's Plan.[2]

I. FINDINGS OF FACT

Based upon the Joint Stipulation of Facts submitted by the parties, the Court makes the following findings of fact. Debtor James Woodling filed his Chapter 13 petition and plan on January 23, 2003. The Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, and Deadlines, as well as a copy of the plan, were mailed to Centex Home Equity Company, LLC, PO Box 199400, Dallas, Texas 75219 on January 26, 2004, providing approximately 45 days' notice of the objection deadline, and 60 days' notice of the plan confirmation hearing.[3] The plan contained a provision that Centex's lien on real property commonly known as 228 E. 6th Street, Emporia, Kansas was "to be stripped, no equity after payment of 1st mortgage."

Centex filed its proof of claim twenty-three days after the notice and plan were mailed to it, on February 18, 2003, demonstrating that it had received a copy of the petition and plan. The address on its proof of claim was 1750 Viceroy, VIAK7, Dallas, Texas 75235. Centex did not object to the terms of the plan at any time before the confirmation order was entered on April 25, 2003, and did not file an appeal of that order. Instead, Centex waited over six months after the March 26, 2003 confirmation hearing, until

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[1]Doc. 15 in the main case.

[2]Doc. 1 in the adversary proceeding.

[3]*See* Doc. 6 in main case.

October 20, 2003, to bring this action, seeking a determination that lien stripping through the plan confirmation process was improper.

II. STANDARD OF REVIEW

Rule 9024 of the Federal Rules of Bankruptcy Procedure makes Rule 60 of the Federal Rules of Civil Procedure, used to relieve a party from a final order, applicable to bankruptcy cases. Rule 9024 provides that "Rule 60 F. R. Civ. P. applies in cases under the Code except that . . . (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by . . . § 1330."[4] Section 1330(1) allows "a party in interest at any time within 180 days after the date of the entry of an order of confirmation under section 1325 of this title, and after notice and a hearing" to revoke the order of confirmation "if such order was procured by fraud." Although fraud may be proved by circumstantial evidence, it is never presumed. "The standard of proof for § 1330 fraud appears to be the classic, demanding standard of establishing fraud by clear and convincing evidence."[5]

III. CONCLUSIONS OF LAW

This matter involves Debtor's attempt to strip off and render void Centex's mortgage on his primary residence based on his claim that Centex is in effect unsecured, because the real estate is worth less than the amount owed on the first mortgage. Centex now seeks relief from the order confirming the Chapter 13 plan through (1) a motion to vacate the order confirming the plan, and (2) an adversary proceeding that

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[4]All statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq., unless otherwise specified.

[5]*In re Siciliano*, 167 B.R. 999, 1014-15 (Bankr. E.D. Pa.1994).

seeks a declaratory judgment finding that the stripping of the lien was improper. Centex also requests, through the adversary proceeding, an order to vacate the order confirming the Chapter 13 plan.

A. 11 U.S.C. § 1322(b)(2) does not prohibit the stripping of a wholly unsecured lien against real property that is Debtor's principal residence.

Centex claims that § 1322(b)(2) prohibits Debtor from stripping its lien. Section 1322(b)(2) gives debtors the ability to "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence." Centex's position is that because it has a security interest in real property that is Debtor's principal residence, § 1322(b)(2) prohibits Debtor from modifying its rights and stripping its lien.

This court agrees with the majority of courts deciding this issue, which hold that a wholly unsecured mortgage can be stripped off in a Chapter 13 case because the debt is not "secured" within the meaning of § 506(a).[6] Under § 506(a), any allowed claim that is secured by a lien on the debtor's property "is a secured claim to the extent of the value of [the] creditor's interest in the estate's interest in such property," and is deemed an unsecured claim to the extent it exceeds that value.[7] An undersecured claim is thus treated as a secured claim only up to the value of the collateral; the excess debt becomes an unsecured claim.[8] Thus when the property in question is worth less than the amount of the liens that are superior to the lien in question, as is alleged by Debtor, § 506(a) dictates that the entire lien be treated as an unsecured

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[6] *See, e.g., In re Pond,* 252 F.3d 122 (2nd Cir. 2001); *In re McDonald,* 205 F.3d 606 (3rd Cir. 2000); *In re Bartee,* 212 F.3d 277 (5th Cir. 2000); *In re Lane,* 280 F.3d 663 (6th Cir. 2002); *In re Zimmer,* 313 F.3d 1220 (9th Cir. 2002); and *In re Tanner,* 217 F.3d 1357 (11th Cir. 2000).

[7] 11 U.S.C. § 506(a).

[8] *In re McDonald,* 205 F.3d at 609.

claim for bankruptcy purposes.[9] Because § 1322(b)(2), by its very terms, only affects secured claims, it does not bar the stripping of a wholly unsecured mortgage.

B. Debtor was not required to file an adversary proceeding in this case in order to strip off Centex's lien on the property.

Centex claims that Debtor was required to file an adversary proceeding to strip off its lien, and that Debtor's attempt to strip the lien through his Chapter 13 plan was improper. Centex relies upon Fed. R. Bankr. P. 7001(2), which provides that "a proceeding to determine the validity, priority, or extent of a lien or other interest in property . . ." is an adversary proceeding.

The Court finds that stripping off the mortgage lien under the facts of this case does not fall within the confines of Rule 7001(2), and thus Debtor was not required to commence an adversary proceeding. "'Validity' for purposes of Fed. R. Bankr. P. 7001(2) means the existence or legitimacy of the lien itself. 'Priority' means the lien's relationship to other claims or interests in the collateral. Finally, 'extent' means the scope of the property encompassed by or subject to the lien."[10] This case clearly does not involve any issues surrounding the "validity" or "priority" of Centex's lien. Similarly, the stripping of an unsecured lien does not require the Court to make a determination as to the "extent" of the lien, as "'extent' relates to the identification of the scope of the specific property that is the subject of the lien."[11] Again, because there is no dispute about what property is subject to Centex's lien, Rule 7001(2) is not implicated.

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[9] *In re King*, 290 B.R. 641, 646 (Bankr. C.D. Ill. 2003) (holding "Where the value of the property is less than the amount of prior liens, the junior mortgage is entirely unsecured and the mortgagee is not the holder of a secured claim.").

[10] *In re Bennett*, 312 B.R. 843, 847 (Bankr. W.D. Ky. 2004).

[11] *In re Hoskins*, 262 B.R. 693, 697 (Bankr. E.D. Mich. 2001).

The majority of courts that have addressed this issue have found that an adversary proceeding is not necessary in order to strip a lien where there is no equity in the collateral. In *In re Sadala*,[12] the court turned to the Official Committee Notes for Rule 3012 for guidance on whether an adversary proceeding was necessary to value a piece of collateral and to strip off any unsecured lien attached to that collateral. The Official Committee Notes state that:

> An adversary proceeding is commenced when the validity, priority, or extent of a lien is at issue as prescribed by Rule 7001. *That proceeding is relevant to the basis of the lien itself* while valuation under Rule 3012 would be for the purposes indicated above [e.g., to determine the issue of adequate protection, impairment, or treatment of a claim in a plan.][13]

The *Sadala* court found that "it appears that an adversary proceeding is only needed when the basis of the lien itself is in dispute and that no adversary proceeding is needed simply to value and to declare void a totally unsecured claim."[14] The court in *In re Bennett* reached the same conclusion and held "no adversary proceeding is required and Rule 7001(2) is not triggered when a debtor seeks to value an allegedly wholly unsecured claim against a residence for the purpose of stripping off a lien."[15]

The Court adopts the reasoning of the *Sadala* and *Bennett* courts and finds that an adversary proceeding is not required to strip a lien under the facts of this case. Debtor is not attempting to contest the validity, priority, or extent of the lien in question. The issue of whether the property is of sufficient value to give Centex a secured claim under § 506(a), which would then require Centex be provided the

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[12]294 B.R. 180 (Bankr. M.D. Fla. 2003).

[13]Fed. R. Bankr. P. 3012 Advisory Committee Notes (emphasis added).

[14]*In re Sadala*, 294 B.R. at 182.

[15]*In re Bennett*, 312 B.R. at 847.

protections of § 1322(b)(2), is different from the types of issues contained in Rule 7001(2) proceedings. Because there are no issues surrounding the validity, priority or extent of the lien in question, an adversary proceeding was not required.

C. Centex cannot challenge the valuation of the property at this stage of the proceedings.

Centex also claims that its lien cannot be stripped in this case because, contrary to the statement in the plan that there is no equity, there is equity remaining in the property after payment of the first mortgage. In other words, Centex claims that it is an undersecured creditor, not an unsecured creditor. As an undersecured creditor, whose lien is protected by some amount of equity in the property, Centex would be protected, by the provisions of § 1322(b)(2), from the stripping of its lien.[16]

Debtor's Chapter 13 plan expressly, and clearly, provides for Centex's lien to be stripped because there is "no equity after payment of 1st mortgage." Centex did not object to this—or any other— provision of the plan, and the plan was orally confirmed at a confirmation hearing held March 26, 2004. The order of confirmation was entered April 23, 2004. Centex received actual notice of the filing of the bankruptcy, and presumably the plan, since they were both mailed the same day to all creditors listed on the matrix. It is clear Centex received such notice, because it filed a proof of claim only eighteen days after the plan was filed and served on creditors. Centex makes no argument that it failed to timely receive a copy of the plan in this case, instead arguing that the mail was not sent to the address Centex used in its proof of claim, and was not directed to the attention of an officer, a managing or general agent, or to any other agent

[16] *In re Tanner*, 217 F.3d 1357, 1359 (11th Cir. 2000) (holding § 1322(b)(2) protects from modification any claim that is secured by any amount of collateral in a debtor's principal residence).

authorized by appointment or by law to receive service of process when the creditor is a corporation, as required by Fed. R. Bankr. P. 7004(b)(5).

The Tenth Circuit Court of Appeals has directly addressed the preclusive effect of confirmation orders in Chapter 13 cases. In *Andersen v. UNIPAC-NEBHELP (In re Andersen),*[17] the Tenth Circuit refused to set aside an order of confirmation that confirmed a plan containing language discharging a student loan. Andersen included plan language providing that (1) the repayment of her student loans would cause an undue hardship and (2) that the student loans would be discharged.[18] The student loan creditor failed to timely object to the language in the plan, and the plan was confirmed by the court without any appeal by the creditor. The creditor later attempted to attack the validity of the confirmation order and the plan claiming, *inter alia*, that the debtor had not made a sufficient showing of undue hardship, that the debtor had failed to bring an adversary proceeding, and that it had not received due process because of failure to properly serve it with process. Many of these same arguments are made by Centex in this case.

The Tenth Circuit rejected the creditor's arguments that the confirmation order should be set aside on the basis that the debtor should have been required to prove undue hardship in an adversary proceeding, even though Fed. R. Bankr. P. 7001(6) clearly requires it. The court noted that "a creditor cannot simply sit on its rights and expect that the bankruptcy court or trustee will assume the duty of protecting its interests,"[19] and that "[t]his argument should have been raised in a timely filed objection to the plan prior

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[17] 179 F.3d 1253 (10th Cir. 1999).

[18] *Id.* at 1256.

[19] *Id.* at 1257.

to confirmation, or argued subsequently in a timely filed appeal attacking the confirmed plan."[20] Based upon these findings, the court concluded that "'[u]pon becoming final, the order confirming a chapter 13 plan represents a binding determination of the rights and liabilities of the parties as ordained by the plan. Absent timely appeal, the confirmed plan is res judicata and its terms are not subject to collateral attack.'"[21]

The Tenth Circuit recently revisited the holding of *Andersen* in *In re Poland*.[22] Although the *Poland* court calls *Andersen* into question, and appears to place certain limits on *Andersen's* applicability, it clarified its holding in *Andersen* in a way that makes it clearly applicable to the case currently before this Court. In *Poland*, the court noted that "*Andersen* rests on the fact that confirmation of the plan, to which there was no objection, amounted to a binding adjudication of undue hardship thereby turning a nondischargeable debt into a dischargeable debt."[23] The *Poland* panel distinguished *Andersen* , finding the student loan debt not discharged, on the basis that the debtor in *Poland* did not include the required specific factual finding of undue discharge in her Chapter 13 plan.

It appears, after a close reading of *Poland*, that had Debtor simply stated that the lien was to be stripped, without providing the appropriate factual basis for that result (i.e. that there was no equity in the property after payment of the first mortgage), then Centex would not be bound by the confirmed Chapter 13 plan. However, in this case, Debtor included a specific factual allegation in his plan that there was no equity in the property after payment of the first mortgage. This factual allegation is akin to the statement

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[20] *Id*.

[21] *Id*. at 1258 (quoting *United States v. Richman*, 124 F.3d 1201, 1209 (10th Cir.1997)).

[22] --- F.3d ----, 2004 WL 1966195 (10th Cir. 2004).

[23] *Id*. at *3.

in the *Andersen* plan that the repayment of her student loans would constitute an undue hardship. In this case, just as in *Andersen*, the language in the confirmed Chapter 13 plan is res judicata, and its terms are not subject to collateral attack. Therefore, Centex is bound by the language contained in the Chapter 13 plan that there is no equity in the property because of the amount owed to the superior mortgage holder.

D. Centex has failed to prove that the confirmation of the Chapter 13 plan was obtained by fraud.

Centex alternatively seeks relief from the confirmation order on the basis that it was procured by fraud. Pursuant to § 1330(a), the Court may revoke any order confirming a Chapter 13 plan, upon motion made within 180 days of the entry of the order, if the order was procured by fraud. In order to prove that Debtor obtained the confirmation order by fraud, Centex must prove (1) that the debtor made a representation regarding his compliance with § 1330(a) which was materially false; (2) that the representation was either known by the debtor to be false, or was made without belief in its truth, or was made with reckless disregard for the truth; (3) that the representation was made to induce the court to rely upon it; (4) that the court did rely upon it; and (5) that as a consequence of such reliance, the court entered confirmation.[24]

Centex makes several allegations in support of its contention that Debtor procured the order confirming the plan by fraud, including:

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[24]*In re Nikoloutsos*, 199 F.3d 233, 238 (5th Cir. 2000); *In re Randolph*, 273 B.R. 914, 917 (Bankr. M.D. Fla. 2002).

1. Debtor's statement that there would be no equity in the property after the payment of the first mortgage, as well as his allegation that Centex did not have at least a partially secured claim against the real property, are both factually incorrect;

2. Debtor's attempt to strip the mortgage through the plan confirmation process, without filing a separate adversary proceeding, is in violation of several provisions of the Bankruptcy Code; and

3. Debtor made false representations to the Court by alleging that the plan in question complied with the Bankruptcy Code.

Based upon this Court's finding that Debtor was not required to file an adversary proceeding to strip the lien if there was no equity remaining after payment of the first mortgage, the only possible basis for finding fraud is that Debtor fraudulently represented that there was no equity remaining in the property after payment of the first mortgage. In other words, Centex must prove that Debtor knew there was, in fact, equity in the property over and above the first mortgage when he propounded his plan.

The only evidence offered by Centex to show that Debtor committed such fraud is an appraisal based upon an examination of the exterior of the property, only, conducted more than five months after the plan was confirmed by the Court, combined with a payoff quote by the first mortgage holder. Based upon those two documents, Centex claims there was approximately $13,000 in equity remaining in the property after payment of the first mortgage.

Neither the appraisal nor the first mortgage payoff, however, were submitted as evidence by Centex, nor have the admissibility of those documents, or the facts contained therein, been stipulated to by the parties. The parties represented to the Court that they did not need an evidentiary hearing, because they could stipulate to all relevant facts. Therefore, the documents are not properly before the Court. However, even if the Court were to consider the documents as evidence, the Court finds there is insufficient

evidence to establish that Debtor obtained the order of confirmation by fraud. First, the Court questions the reliability and accuracy of the appraisal submitted by Centex, as it was based solely upon an exterior appraisal of the property, which may not reflect the true value of the property.[25] Second, the appraisal was not completed until several months after the confirmation of Debtor's plan, and thus there is no evidence what the property's value was at the time the plan was filed. Finally, there is no evidence that Debtor knowingly undervalued the property or that he acted with a reckless disregard for the truth in order to obtain confirmation.

Centex has presented no evidence to show that Debtor procured the order confirming his plan through fraud. Therefore, the Court denies Centex's request to set aside the confirmation order pursuant to § 1330(a).

E. Centex cannot obtain relief from the order confirming the Chapter 13 plan through Fed. R. Civ. P. 60(b).

Centex also seeks relief from the order confirming the Chapter 13 plan through Fed. R. Civ. P. 60(b) on the grounds that its failure to object to Debtor's plan should be considered excusable neglect. The Court finds this request to be without merit, as excusable neglect is not a basis for revoking an order confirming a plan.

Fed. R. Bankr. P. 9024 incorporates, with certain limitations, Fed. R. Civ. P. 60(b), which allows for relief from an order on the grounds of "mistake, inadvertence, surprise, or excusable neglect." One of

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[25] *In re Siciliano*, 167 B.R. at 1011 (declining to credit expert's testimony regarding value of house in part due to fact appraiser performed exterior, only inspection).

the limitations is that "a complaint to revoke an order confirming a plan may be filed only within the time allowed by . . . § 1330."[26] Therefore, when a creditor is seeking to set aside an order confirming a plan, as is the case here, the only method of doing so is through § 1330.[27]

Therefore, Centex's request that the order confirming the plan be set aside on the basis of excusable neglect is denied.

F. Centex was not denied due process by having its lien stripped through language contained in Debtor's plan.

Centex also argues that it was denied due process because it did not receive notice of Debtor's intent to strip its lien in the manner required by an adversary proceeding, i.e., through service of a summons and complaint in the manner required by Fed. R. Bankr. P. 7004(b)(5). Both the Tenth Circuit and this Court have previously held that where a creditor receives actual notice of a plan that contains provisions adverse to the creditor, rather than by the service and notice required by Fed. R. Bankr. P. 7004, and has been afforded a reasonable opportunity to object and have a hearing, the creditor has been accorded due process.

In *Andersen*, the creditor also claimed that it had not received proper due process because the debtor attempted to discharge her student loan through the plan, rather than filing an adversary proceeding and serving a copy of the summons and complaint in accordance with Rule 7004. The Tenth Circuit held

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[26]Fed. R. Bankr. P. 9024.

[27]*In re Young*, 237 B.R. 791, 803 (10th Cir. B.A.P. 1999) (holding that § 1330 "provides the complete substantive basis for all motions for revocation of confirmed Chapter 13 plans"); *In re Valenti*, 310 B.R. 138, 147 (9th Cir. B.A.P. 2004).

that the creditor was afforded appropriate due process protections in that it received adequate notice of the plan and an opportunity to object to the provisions of the plan prior to confirmation.[28] This Court, in *In re Boyer*,[29] has also recently found that student loan creditors who were given notice that their student loans were to be discharged through the Chapter 13 plan, and given an opportunity to object to the discharge provisions in the plan prior to confirmation, were afforded appropriate due process.[30]

The Court finds that Centex was afforded the same due process rights as the creditors in *Andersen* and *Boyer*. Centex received adequate notice that Debtor was taking adverse action against its interests, and it had an adequate opportunity to object to the plan prior to its confirmation. Again, Centex never suggests it failed to receive the plan or objection deadline notice. Therefore, the Court finds that Centex's due process rights were not violated by Debtor's failure to serve Centex in accordance with Rule 7004.

IV. THIS COURT ADOPTS MOTION PRACTICE FOR STRIPPING OF LIENS

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[28]*In re Andersen*, 179 F.3d at 1256 n.6 (holding "given the fact that [the creditor] does not complain that it lacked adequate notice of . . . plan prior to confirmation, 'it appears due process has been accorded.'"). This Court also notes that the Tenth Circuit so held notwithstanding a finding that Fed. R. Bankr. P. 7001(6) requires the filing of an adversary proceeding to discharge student loans. Accordingly, although the creditor in *Andersen* was entitled to receipt of a summons and a complaint, failure to receive it was not seen as depriving it of due process in light of the creditor's actual receipt of the plan. If the Tenth Circuit held the creditor was afforded due process in a case where an adversary proceeding was actually required, then this Court assumes that the Tenth Circuit would also so hold in a case where an adversary proceeding was not required.

[29]305 B.R. 42 (Bankr. D. Kan. 2004).

[30]*Id.* at 54. This Court further noted in *Boyer* that pursuant to Fed. R. Bankr. P. 7001(6), the only proper way to discharge a student loan is through an adversary proceeding, and cautioned debtors' counsel to henceforth file such an adversary proceeding, as the Debtor approaches completion of the plan, instead of using the confirmation process. The Court noted in its holding that it was bound by the 10th Circuit's holding in *Andersen* that the plan was res judicata, notwithstanding the improper procedure used to determine undue hardship.

Although the Court has refused to set aside confirmation of the plan in this case, including the strip off of Centex's mortgage lien, because Centex received actual notice of the adverse plan, and because of the priority the Tenth Circuit places on finality of confirmed plans, this Court will use the vehicle of this case to inform the bar how it wishes to handle lien stripping, henceforth. This Court has seen at least four methods used by debtors to strip off liens: 1) through plan provisions; 2) through an adversary proceeding; 3) through a claim objection; and 4) through motion practice. Having compared and analyzed the separate methods, the Court adopts the motion practice, more thoroughly articulated below, for essentially the same reasons articulated in *In re Bennett*,[31] *In re Robert*,[32] and *In re Sadala*.[33] Debtors shall file motions contemporaneously with filing their plans, unless the dispute involves a determination of the validity, priority, or extent of the underlying lien, in which case an adversary proceeding is required under Fed. R. Bankr. P. 7001(2).

A. Contents of Motion

Stripping off a creditor's mortgage lien against residential real property involves a taking, which mandates basic due process requirements of proper notice. To comport with due process, notice must be

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[31]312 B.R. 843 (Bankr. W. D. Ky. 2004) (adopting motions practice because Rule 3012 allows courts to determine value of a claim secured by lien on property by motion, because it provides sufficient due process safeguards, including sufficient advance notice, and opportunity to object and a hearing, and because it requires proper service under Rule 7004).

[32]2004 WL 1949705 (Bankr. N.D.N.Y. 2004) (adopting motions practice to strip off liens for the same reasons as *In re Bennett*, noting it is a streamlined manner to determine value, with adequate procedural safeguards).

[33]294 B.R. 180 (Bankr. M.D. Fla. 2003) (adopting motions practice because adversary proceeding needed only when basis of lien, itself, is in dispute, and not simply to value and declare void a totally unsecured claim, noting adversary proceedings are more formal, take longer, and are more costly, without any significant benefits to the parties).

reasonably calculated to bring to a party's attention the nature and substance of the pending determination, and it must afford a reasonable time in which to respond. The "nature and substance" portion of notice requires debtors to provide sufficient information and description to enable creditors to understand that the debtor intends to strip off the creditor's lien, and should, at minimum, specifically identify the name of the creditor, as well as provide the street address and legal description of the subject real property.

The motion should also clearly and unequivocally state that the debtor intends to both strip off the creditor's secured interest on the real property and treat the creditor's claim as wholly unsecured. The motion should also state the factual basis for the lien stripping, including the fact that there is no equity because a prior mortgage(s) balance exceeds the property's value. Debtor should provide the calculations to support this conclusion.[34] If each of these elements is included in a separate motion that accompanies the plan, and if the motion is properly served under Rule 7004(b)(5), the creditor will have received sufficient information to assess the nature and substance of the proposed lien strip off.

This Court does not believe that merely serving a copy of a Chapter 13 plan, which proposes to strip off a lien at confirmation, even if it contains the above information, is sufficient to insure protection of the due process rights of junior lienholders. This is true for two reasons. First, this Court frequently sees multi-page, single-spaced plans that contain lengthy boilerplate language dealing with mortgages and other subjects. Even if all the above information about the lien was inserted somewhere within such lengthy boilerplate, the fact is that the key information the creditor needs to know would be in effect hidden within

[34]In researching this issue, the Court learned that the Bankruptcy Court for the District of Colorado requires such pleadings to be verified. *See* Colorado Local Bankruptcy Rule 320(c)(3).

the verbiage. Second, receipt of a separate motion that immediately indicates, by its caption[35] its intent to take away the property rights of a specially designated creditor, without the attendant verbiage often seen in plans, provides much better notice to the creditor of the attempted taking.[36]

B. Service of Motion

The Court will also require debtors to serve the motion contemporaneously with its plan, which under Fed. R. Bankr. P. 2002(b)(2) grants parties at least 25 days' notice of the confirmation hearing for a Chapter 13 plan. Service of the motion in this manner, as well as the Notice of Hearing and objection deadline on the motion, will give the creditor not only sufficient notice that the debtor intends to strip its lien, but in addition, sufficient time to investigate the alleged facts concerning lack of equity, and to object, if appropriate. The creditor should be allowed time to seek a copy of the appraisal, or other underlying basis for the debtor's allegation that the mortgage lien has no value, and serving the motion with the plan will accord the creditor the opportunity to obtain that information.

The debtor will also be required to serve the Motion to Strip Off Mortgage Lien pursuant to Fed. R. Bankr. P. 9014(b), which incorporates Rule 7004. Under Rule 7004(b)(5), service by first class mail

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[35]The caption should also contain language that will put the creditor on notice of the relief being sought against it, such as "Motion to Strip Off Mortgage Lien of Centex."

[36]As noted above, the Court finds that Centex was afforded due process in this case. The Court's concerns about plans that bury language stripping a lien within boilerplate language contained in a lengthy plan, are not applicable in this case as Centex was clearly identified, in bold type, with a recitation of the property address, and its proposed treatment—"lien to be stripped" set forth in a rather short plan. Further, there is no dispute that Centex received that plan with appropriate opportunity to object. The Court, in adopting these requirements, is seeking to insure that future creditors are afforded due process, even if the requirements were not necessary to insure Centex's due process in this case.

upon a corporation, a partnership or any other unincorporated association must be made by mailing a copy to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the creditor.[37]

Debtors will also be required to file a Certificate of Service, reflecting that service has in fact been accomplished on the impacted creditor as required by this rule.

C. Stripping not effective until completion of plan and issuance of discharge order.

In order to protect the creditor's interests in the event a debtor fails to complete a Chapter 13 plan, any motion filed under the above procedure, as well as any order submitted to the Court granting such a motion, must include language indicating that the debt will be treated as an unsecured claim during the pendency of the Chapter 13 plan, and that the lien will become void only after satisfactory completion of the plan and entry of a discharge order. The motion and order may state that entry of a discharge order will have the effect of automatically voiding the lien.

This Court does not intend to confirm plans that fail to comply with these rules, if such failure is brought to its attention prior to entry of an order of confirmation, and will question the good faith of a filing that does not so comply.

V. CONCLUSION

The Court finds that Centex is not entitled to any relief in this case. Section 1322(b)(2) does not prohibit a debtor from stripping a lien against his primary residence where the creditor is wholly unsecured

[37]Fed. R. Bankr. P. 7004(b)(3).

due to lack of any equity to secure that creditor's mortgage lien. Debtors are not required to file an adversary proceeding to strip such a lien, because the debtor is not contesting the validity, priority or extent of the lien in question. Instead, Debtor is merely contesting valuation, which is daily fare for bankruptcy courts outside of adversary proceedings.

The Court also finds that Centex is barred from contesting the valuation of the collateral at this late date, because confirmation of the plan is res judicata as to provisions of the confirmed plan. In addition, the Court finds that Centex has failed to meet its burden of proving that the confirmation order was procured by fraud, that it is entitled to relief under Fed. R. Civ. P. 60(b), or that it was denied due process.

The Court also adopts a structured motions practice for dealing with liens of this nature in the future, as explained more fully above.

IT IS, THEREFORE, BY THIS COURT ORDERED that Centex's Motion to Vacate Confirmation of Plan is denied.

IT IS FURTHER ORDERED that judgment be entered in Woodling's favor as to all issues raised in the Adversary Complaint for Declaratory Judgment to Determine Improper Stripping of Lien.

IT IS FURTHER ORDERED that Centex's post-confirmation Objection to Debtor's Plan is denied.

Dated this _____ day of October, 2004.

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